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No.

Supreme Court, U.S.
FILED
DEC 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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# BRIEF FOR THE PETITIONER

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59pp

## QUESTIONS PRESENTED

1. Under 5 U.S.C. 702, a person suffering legal wrong because of agency action, or adversely affected, or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. §702 states in part:

> "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States."

Is the decision of the court of appeals, that suit is barred on the statute of limitations §2401, supported by substantial evidence or law, not legal error, arbitrary or capricious, and not otherwise contrary to law and an infringement on Amendment rights because the petitioner's suit is bifurcated as a monetary claim under 28 U.S.C. 1346 and

non-monetary claim under 28 U.S.C. 1361 permitted by 10 U.S.C. 1552, with suit filed in 1983 challenging the Army Board for Correction of Military Records' own legal wrong committed in 1981 and 1982 ?

2. Did the district court and the court of appeals apply the correct standard of review to petitioner's claims because the apparent conflict between decision which is subject of petition and decisions of court of appeals for other circuits, firmly rooted in case law, compelled the Supreme Court to grant certiorari under similar circumstances ?

3. Whether the court of appeals has so far departed from the accepted and usual federal proceedings and question of federal law and so far sanctioned such departure by the district court, as to call for an exercise of the Supreme Court's power of supervision on a veteran's claim ?

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## OPINIONS BELOW

The Judgment/Order of the court of appeals (App. A1-A4) and the Judgment/Order of the district court (App. B1-B8) are unreported. The final decision of the Army Board for Correction of Military Records (ABCMR) is found in the appendix hereto at E1-E2.

## JURISDICTION

The Judgment of the court of appeals

was entered on November 13, 1986. The petition for a writ of certiorari was filed on January 7, 1987. The United States Supreme Court granted petitioner's prior certiorari in this case. (App. C1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISION INVOLVED

1. CONSTITUTION, Amend. I provides:

> No person shall be denied redress.

2. CONSTITUTION, Amend V provides:

> No person shall be denied due process of law.

3. CONSTITUTION, Amend XIV provides:

> No person shall be denied equal protection of law.

4. 5 U.S.C. 702 provides for "Right of Review". Section 702, as amended in 1976, states that an:

> "action in a court of the United States seeking relief other that (sic) money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official

capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States."

5. 28 U.S.C. 1346(a)(2) provides in pertinent part:

Jurisdiction of district court on monetary award waived over $10,000.00 against the government.

6. 28 U.S.C. 1295(a)(2) provides:

Jurisdiction of the United States Court of Appeals for the Federal Circuit of an appeal from a final decision of a district court based on §1346(a)(2), supra. See App. C1.

7. 28 U.S.C. 1631 provides:

Transfer to cure want of jurisdiction in the interest of justice. See App. C1.

8. 28 U.S.C. 1361 provides:

Action in the nature of mandamus to compel an officer of the United States ... to perform a duty owed to the Plaintiff.

9. 10 U.S.C. 1552 provides in part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department,

> may correct any military record of that department when it considers it necessary to correct an error or remove an injustice. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before 26 October 1961, or within three years after he discovers the error or injustice, whichever is later.1/ However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

10. Army Regulation (AR) 15-185 provides in pertinent part:

> 1. Scope and applicability. This regulation establishes procedures for making applications, for the correction of military records by the Secretary of the Army acting through the Army Board for Correction of Military Records (hereafter referred to as the board or ABCMR).
>
> 2. Authority. 10 U.S.C. 1552.

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1. Petitioner first discovered the Army's violations of its own regulations and denial of his promotion based on an incomplete application in 1980.

> 20. Action by Secretary of the Army. ... the Secretary of the Army who will direct such action in each case as he/she determines to be appropriate.

11. AR 610-15, paragraph 3c, governed by 10 U.S.C. 591a provides:

> "Applicants for appointment in the counterintelligence career warrant must, in addition to fulfilling requirements of a above, fulfil the applicable requirements of AR 600-148."

12. AR 600-148 provides in pertinent part:

> 5.b(1) "Waivers. Waivers of any of the prerequistes prescribed in a above, except citizenship, may be requested. Waivers will be confined to personnel who do not have the prerequisites, but have demonstrated ability, high mental capacity, or outstanding performances of duty to a degree which compensates for the lack of the prerequisites for which waivers are requested."2/

> 5.b(2) "Request for waivers will state the prerequisites for which waivers are requested, and will give full information concerning the back-

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2. Petitioner met all of the required prerequisites except two years college for which he more than compensated and for which waiver was authorized and approved.

ground, prior service, and any special qualifications the individual may possess. The individual's immediate commander will comment on the request for waivers, recommending approval or disapproval with the reasons therefor." 3/

7.d. "All headquarters or agencies in the chain of command will process applications not accompanied by the aforementioned documents and photographs will be returned to the applicant for compliance with these provisions. 4/

7.e and 9.c. "Upon disapproval because of the absence of vacancies or for other reasons, the applicant will be notified accordingly by The Adjutant General/army commander", respectively.5/

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3. Request for waiver and commander's comment is the only document missing from Army files and case, which the Army lost.

4. CIC ruled on an incomplete application and violated said Army regulations by its failure to return petitioner's application for completion/compliance as required.

5. The Army in violation of its own regulations, although it notified petitioner that he was not favorably considered for appointment as warrant officer, failed to notify him of the regulatory reasons for the disapproval.

## STATEMENT

1. The petitioner is 67 years of age and a native American citizen. In 1962, petitioner's retirement from the United States Army with over 20 years active military service was approved pursuant to 10 U.S.C.3914. He is currently retired in the grade of Master Sergeant (E7) but remains a member of the Regular Army for life, pursuant to 28 U.S.C.3075(a)&(b).

2. Petitioner's military service included ten (10) years overseas duty. He is a veteran encompassing World War II, Korea and Vietnam, in the interest of national security and defense. He held various and important investigative agent assignments in foreign and domestic intelligence field operations and administrative functions, including adjudication on security surveys and inspections of Advanced (Nuclear) Weapons, having held Top Secret, Cryptographic and Cosmic

classified security clearances in the performance of his duties. He had an exemplary service record both in combat and as a counterintelligence agent [6/] and served his country honorably and faithfully as a member of the military service.

3. Petitioner's army retirement was precipated by the fact that he was understandably discouraged having been locked in his same sergeant rank for over ten years, with promotion having been denied in Circa 1952 and the reason kept from him, notwithstanding he had a superior character and efficiency rating for ten years previously.

4. In 1951, petitioner applied for appointment as warrant officer in the Counterintelligence Corps (CIC) in accordance with applicable Army Regulations (AR) 610-15 and AR 600-148, supra.

6. Attested to by Appellee in his Memorandum of Law to his motion to dismiss, dated June 2, 1983.

5. In a letter, dated 22 January 1952, petitioner was notified through the Army chain of command that he had been selected for appointment by his First Army Headquarters and that his application was forwarded to The Adjutant General (TAG) in accordance with current directives. However, TAG had informed that headquarters that petitioner's appointment ... was not favorably considered.

Significantly, the only documentation petitioner had in his possession prior to 1979, relative to his application for appointment, was the letter, supra, which notified him that his promotion had been denied, failed to contain any reasons for the disapproval. App. D.

6. Immediately thereafter the denial in 1952, attempts to obtain the reasons met with the Army's directive "you don't question higher authority" (48).[7/]

7. Indicates page of appendix to petitioner's brief to the Court of Appeals.

7. Petitioner's superior officers' Affidavit sworn 15 June 1981 and a Letter dated 21 June 1982 attest to his being more than worthy of appointment and question lack of reason for the denial, respectively (46,47 and 49).[7/]

8. The denial of petitioner's advancement to warrant officer permanently injured his army career and he reluctantly therefore retired in 1962, supra.

9. Commencing in December 1978, under the Freedom of Information Act, petitioner sought copies of official Army records and regulations relating to his warrant officer application and denial. The Army furnished all of the documents, except petitioner's request for educational waiver and his immediate commander's statement thereof, which was reported not on record (34,35).[7/]

10. On the basis of the documents furnished, supra, petitioner learned for

the first time, Circa 1979-80, that the Army was prevalent in violations of its own regulations in denying him appointment as warrant officer in 1952.

Petitioner learned that his application as warrant officer was recommended by his immediate and next highest superior officer, and by a qualified and competent review board, which rated him "superior" for moral character and general fitness and a final rating of "excellent" for appointment, and was "approved" by his First Army Commanding General (31,32).[7] and that the Surgeon General qualified him physically for appointment (99).[8]

Petitioner further learned, significantly, the notification he received that his appointment had been denied, failed to contain any reasons for the disapproval, App. D, but were required pursuant to AR 600-148, par. 7e, supra.

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8. Indicates page of certified record on appeal.

Petitioner furthermore learned, significantly, that denial of his appointment was based on an incomplete application, absent his request for educational waiver and commander's statement, supra, required pursuant to AR 600-148, par 5b (2), and furthermore required return to petitioner for re-completion and re-submittance, pursuant to AR 600-148, par. 7d, governed by §591a, supra.

In addition, the correspondence transmitted from TAG to CIC and return include eight inclosures, absent the waiver and commander's statement, supra, relative to petitioner's application (99, 100 and 101),[8/] first discovered in 1980 by petitioner, supra.

11. From the foregoing, it is clear on the face of the record that TAG had no authority to deny petitioner's appointment, and that TAG violated Constitutional, statutory and regulatory provisions.

12. On 13 June 1980 petitioner filed an application with 31 inclosures with the ABCMR seeking reversal of the prior determination which denied his advancement to warrant officer status, and requesting back pay from date of denial and appropriate warrant officer grade he would have achieved upon his retirement. His application to the ABCMR was predicated under the provision to recover on liability created by Statute 10 U.S.C.1552(a)& (b), which provides for correction of an error or removal of injustice, in the interest of justice, supra.

13. Via determination on 12 January 1981, the ABCMR denied petitioner's application. The petitioner then requested reconsideration on 30 June 1981. The ABCMR denied the application on 24 March 1982 finding: "Applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material

error or injustice" (50,52).[7/]

14. Pursuant to AR 15-185, supra, petitioner thereafter sought appeal (53, 54),[7/] which was subsequently denied by the ABCMR in a letter on 7 June 1982, (55,56).[7/] The ABCMR's subsequent letter on 20 July 1982, in part states substantially that the denial constituted final agency action; that petitioner was not barred from asking for reconsideration upon discovery of additional substantive evidence; and that petitioner has the right to institute action in a Federal Court. App. E.

15. Thereafter, petitioner commenced suit in the federal district court on 23 February 1983 pursuant to 10 U.S.C. 1552 and 28 U.S.C. 1346 and 1361 arguing denial of his application for warrant officer appointment, constituted an abuse of discretion, was unsupported by substantive evidence, was violative of due process and equal protection rights, was

against the great weight of evidence, and constituted an administrative action arbitrary and capricious in nature, and was in violation by the Army of its own regulations. Petitioner's Complaint is (59, 62).[7/]

16. Following cross motions for summary judgment, the district court entered its determination granting the Appellee's motion and dismissing the petitioner's cause of action. App. B1.

17. Significantly, respondent had abandoned his denial of violations in his motion grounds to dismiss. App. B2.

18. The court of appeals affirmed the district court's Judgment that granted Appellee Secretary of the Army summary judgment and dismissed as barred by the statute of limitations (28 U.S.C. 2401) Clement J. Pacyna's complaint seeking review of the decisions by the ABCMR. App. A1-A4.

19. The basis for federal jurisdiction in the district court is found in 10 U.S. C. 1552 and 28 U.S.C. 1346 and 1361.

ARGUMENT

At the outset, petitioner notes that there is a Constitutional and statutory defect in the decision below. The Court of Appeals for the Federal Circuit lacked legal authority to deny petitioner's appeal to review the ABCMR's decision in 1982, because 5 U.S.C. 702 provides for "Right of Review" of wrong permitted by 10 U.S.C. 1552 and 28 U.S.C. 1361, and Amendments I, V and XIV provide for "redress", "due process" and "equal protection" of law, respectively.

In addition to the foregoing, the petitioner seeks allowance of his petition for a writ of certiorari for the following independent reasons:

a. the court of appeals has so far departed from the accepted and usual

course of judicial proceedings,

b. the court of appeals has so far sanctioned the departure from accepted and usual judicial proceedings by the district court, and

c. the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

To help clarify the issues involving this case, the petitioner's suit is based on not one but two separate issues, under S1346 for monetary relief and under S1361 for non-monetary or promotion relief under S1552.

Neither the district court nor the court of appeals addressed petitioner's allegations of the ABCMR's own wrong in 1982 relative to his S1361 suit in 1983.

## The ABCMR DECISION

The ABCMR final decision in 1982, that there is no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as warrant officer in 1952, supported by substantial evidence, is wrong on its face, arbitrary and capricious, and is otherwise contrary to Constitutional, statutory and regulatory provisions, supra.

Significantly, the Respondent does not deny petitioner's claims of the Army's violations in 1952 nor the ABCMR's wrong in 1981-82, as it is not a ground in his motion to dismiss the suit. App. B2, (63).[7/]

Therefore, the only issue before This Court is that the courts below barred suit on the Respondent's ground to dismiss on statute of limitations. Consequently, upon this Court's finding suit has "Right of Review" under S702, supra, reversal is due.

Nevertheless, to show that the ABCMR

did indeed commit wrong in its denial in this case, the following supported substantial question asked is: "What about the documents the petitioner submitted, referred to herein and had by the ABCMR?

At App. D is the letter dated 22 January 1952, which notified applicant of disapproval of his appointment, but are absent the reasons required under AR 600-148, par. 7e and 8c, supra.

At (99, 100, 101) [8/] are the correspondence from TAG to CIC and return which shows eight inclosures, indicating said agencies ruled on an incomplete application, because absent is the applicant's waiver request and commander's statement, which, the only document relative to his application for promotion, is not a matter of record (34,35) [7/] but which is required pursuant to AR 600-148, par. 5b, and in addition incomplete applications were required to be returned to the appli-

cant under AR 600-148, par. 7d, supra.

At (48) [7/] is the Affidavit sworn to by Applicant, under penalty of perjury, that shows when he attempted to know the reasons for denial of his appointment, the Army's directive was: "You don't question higher authority", a clear violation of his amendment rights, supra.

At (100,101) [8/] is the damaging unfavorable decision by CIC, which did not state applicant's waiver requested is disapproved, a consistent response, but instead questionably states: "Record of service as enlisted man with CIC does not warrant granting the educational waiver necessary under AR 600-148". This is evident that CIC did not have the waiver request, which contained applicant's prerequisites and commander's comment with approval required by par. 5b, supra, and in that said document is missing, supra.

Petitioner contends, that the viola-

tions by the Army of its own regulations and its obstructing his amendment rights in 1952, supra, directly prevented his appointment as warrant officer, and his distinguished military record bore a "blemish" which remained until his retirement in 1962 and continues to remain.

Further, this unlawful rejection hampered his ability to advance in rank, thereby effecting his army pay and retirement benefits.

Furthermore, that had he been notified of the reasons for disapproval, and not been denied inquiry, doubtless efforts could have been made in 1952 to remedy the situation by him and his commanding and superior officers who were quite enthusiastic about petitioner's appointment.

The District Court Decision

The district court found that the suit is barred by the statite of limitations under 28 U.S.C. 2401.

The petitioner contends that the district court's finding is clearly erroneous, arbitrary, capricious and contrary to law. Further, that the district court applied the wrong standard of review to petitioner's or veteran's suit.

The district court's opinion that petitioner cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute, and thusly the 1983 suit is barred, is without basis of fact and law and is contrary to §1346, §1361, §1552 and §702, supra, respectively.

Petitioner contends that his cause of action is a claim on a basis of law under §1346 and §1361, and on a basis of fact and law under §1552 sufficient to demand

judicial attention in light of the ABCMR' own wrong committed in 1981 and 1982, not the Army's wrong, which indeed was, committed in 1952, supra. Therefore petitioner's suit in 1983 on the basis of the ABCMR' final agency action by misrepresentation in 1982, cannot be barred under any existing law.

The standard of review to petitioner's claims by summary judgment was therefore "erroneous" to say the least, because facts exist and a substantial question of law is involved. Stauffer Laboratories, Inc. v. Federal Trade Comm., supra.

A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. United States Gypsum Co.(1948), supra. The foregoing decision of the ABCMR shows it is mis-

taken and did not address or it misrepresented the petitioner's claims, as also did the district court.

In fact or effect, Appellee supported remand. In the brief for Appellee, at page 8 thereof, to the court of appeals, doubt was cast on the district court not having addressed the issues claimed in petitioner's complaint and cross motion papers relative to the ABCMR' own wrong in Circa 1981-82. The Appellee suggested "the court could remand the case for consideration of matters not briefed, argued, or decided below", citing Sammt v. United States, 780 F.2d 31 (1986).

It is necessary to note, that the ABCMR final decision offered reconsideration and did not time bar petitioner's claims, which is contrary to Appellee's ground to time bar in his motion to dismiss, after suit was filed, supra.

The district court's finding or re-

liance on the Appellee's case law or defense: United States v. Kubrick and Konecny v. United States, supra, is misplaced and not applicable to petitioner's or military veteran's case conferred by §1552. In Kubrick it was a tort injury claim. In Konecny it was an action against the United States for alleged taking of his property as a result of fluctuation of level of lake because of operation of government flood control dam.

REASONS FOR GRANTING THE WRIT

1) THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONTRARY TO STATUTORY PROVISIONS AND IS AN INFRINGEMENT ON AMENDMENT RIGHTS.

As aforementioned, an action under §1361 permitted by §1552 shall not be dismissed nor relief denied under §702.

Therefore, the decision of the court of appeals that suit is barred by the statute of limitations on the basis that:

"Appellant's argument that we must review the ABCMR's 1981 and 1982 decisions concerning a matter that accrued 31 years before this suit is contrary to law",

supported by substantial evidence and law, is legal wrong on its face, perverted, obfuscated, arbitrary, capricious, and is otherwise contrary to §702 and an infringement on amendment rights, supra.

Petitioner contends that his 1983 suit is on a final action accrued in 1982 by reason of the ABCMR's own wrong, not the allegations of prior Army wrong, which

indeed did occur in 1952; is an action to recover on liability created by statute §1552; is predicated on a writ of mandamus under §1361; is of a Constitutional, statutory and regulatory nature; and is provided "Right of Review" under §702.

That of the four cases on which the court of appeals based its decision, one was dismissed as untimely, two were not under §1552 and §1361 and of a Constitutional nature, and one was remanded, not applicable or analogous to this case.

2) THE FEDERAL QUESTIONS HEREIN HAVE BEEN DECIDED BELOW IN A WAY WHICH IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS, FIRMLY ROOTED IN CASE LAW, OF THIS COURT.

The decision below directly conflicts with the principles in this Court's granting certiorari where court of appeals for two or more circuits, and where continuance of important federal questions were presented, compelled this Court to grant

certiorari, as in Donaldson, Jackson, Knetsch, Rogers, U.S. and Yellin, respectively, supra. (Citations omitted).

3) THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME SUBJECT MATTER.

In holding that petitioner's suit is barred by the six-years statute of limitations, 28 U.S.C. 2401, the court of appeals has departed from the procedure aplied by other courts in similar fact situations, and for which reasons this Court was compelled to grant certiorari, supra.

This question has been addressed by at least five circuit courts of appeals, four courts of claims and four district courts, with the respective cases cited below, ruling the commencement of the statute of limitations begins with the final determination of the administrative agency, not with the initial military

actions complained of, herein, as in: Ballenger, Bard, Baxter, Bishop, Brin, Calhoun, Eicks, Hamlin, Hodges, Kaiser, Martin, Mulvaney, Powell, Quinn, Sherengos, Simmons, Uhley, Von Hoffburg, Walters, Wood and Yagjian, supra.(Citations omitted).

In Kaiser, the court found that an "interest of justice" outweighed any government argument of prejudice, and allowed the application to be heard before the court, ruling the government had waived any previous right to assert a defense of...by reason of the prior proceedings in the agency. In Kaiser, a problem Circa 1948, Correction Board's final action in 1979, and suit filed in 1981, the court denied defendant Secretary's and Board's motion to dismiss, a matter 33 years before suit.

In Yagjian, a problem Circa 1944-45, ABCMR denial in 1981 and suit filed in

1983, the court rendered judgment for Plaintiff, a matter 38 years before suit.

In Yee, supra, the court held wherein the military board failed to correct an injustice clearly documented, in failure to so do constitued arbitrary and capricious determination subject to reversal.

In Committee for GI Rights, supra, this court restated its general rule requiring exhaustion of military remedies as predicate to relief for members of armed forces in civil courts.

In Ogden, supra, this court affirmed the purpose of the Board of Correction of Military Records, was intended for relief from error or injustice at hands of armed forces, and was not intended to preclude judicial review.

4) THE DECISION OF THE COURT OF Appeals HAS SO FAR SANCTIONED A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS BY THE DISTRICT COURT.

Petitioner contends that the misconduct of the ABCMR in 1981 and 1982, does give rise to his suit filed in 1983, and that there is no law to legally bar it.

It is clearly evident from the Cavalier treatment on the record, that neither the court of appeals nor the district court gave a thorough and good faith effort review of the petitioner's claims nor addressed his mandamus suit.

The standard of review of this case by the courts below was "erroneous" because facts exist and a substantial question of law is involved. Stauffer v. Laboratories, Inc. v. Federal Trade Commission, supra. The findings of the courts below may not be upheld if based upon an erroneous view of law. Ritter v. Morton, supra.

5) THE FEDERAL QUESTION HEREIN HAS NOT HERETOFORE BEEN DETERMINED BY THIS COURT.

Whether the decision of the courts below barring this suit on the six-years

statute of limitations is legal error and infringement of amendment and statutory provisions, since mandamus suit was filed in 1983 on ABCMR's own wrong committed in 1981-82 and "Right of Review" is provided under §702 permitted by §1552, supra?

This writ therefore raises a novel question of interpretation relating to the Exhaustion of Administrative Remedies Doctrine, conferred by §1552, and whether the court can bar suit contrary to §702 when the ABCMR commits its own wrong relative to §1552 and is timely challenged by military veteran under §1361?

Petitioner contends, that the barring of his suit by mere opinion and "rubber stamping" under the above circumstances, the courts below acted to legislate new law and over-ride existing law, for which neither has legal authority.

An Appellate court may enter judgment upon reversing a case if it finds the

facts are adequately developed in the record and it is able to direct judgment in favor of one party as a matter of law. Perkins v. Matthews, supra.

The availability of consistent relief through the federal courts from military correction boards' misconduct will be effectively denied veterans and amendment, statutory and regulatory provisions will be meaningless, unless strictly adhered to by the government and judiciary.

Therefore, certiorari is warranted in order that a conflict in law as determined by federal circuit courts may be resolved, and that under amendment rights petitioner and other veterans may receive treatment consistent with similar facts before other circuit and federal courts.

## CONCLUSION

From the foregoing, it is clear that the courts below have decided an important question of federal law affecting millions

of veterans, which has not been, but should be settled by this Court.

Petitioner submits his military record amply demonstrates his patriotism, loyalty, and love of country, and remains confident the American system of justice will prevail and vindicate his position.

For the foregoing reasons, this Court should grant the writ of certiorari and sua sponte summarily reverse the judgment below, and grant petitioner the relief sought in his cross motion papers.

Respectfully submitted.

Clement J. Pacyna

CLEMENT J. PACYNA, Pro se
MSG, U.S. ARMY, RETIRED
1151 Wehrle Drive
Williamsville, New York 14221
Telephone (716) 632-4078

Dated: January 7, 1987

# APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CLEMENT J. PACYNA,
Appellant,
v.
JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
Appellee.

Appeal No.86-1488

JUDGMENT

ON APPEAL from the United States District Court for the Western District of New York in CASE NO(S). 83-205-C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/S/ FRANCIS X. GINDHART
FRANCIS X. GINDHART, Clerk

DATED NOV 13 1986

ISSUED AS A MANDATE: December 4, 1986

"Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically."

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

| | | |
|---|---|---|
| CLEMENT J. PACYNA, Appellant, | ) | |
| v. | ) | Appeal No.86-1488 |
| JOHN O. MARSH, JR., SECRETARY OF THE ARMY, Appellee. | ) | |

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DECIDED: November 13, 1986

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Before RICH, BALDWIN, and NIES, Circut Judges

PER CURIAM.

DECISION

The March 7, 1984, Judgment of the United States District Court for the Western District of New York granted appellee Secretary of the Army summary judgment and dismissed as barred by the

statute of limitations Clement J. Pacyna's complaint seeking review of the decisions by the Army Board for Correction of Military Records (ABCMR). We affirm.

OPINION

The district court correctly held that appellant's claim accrued in 1952 when he was denied appointment as a warrant officer, see Bray v. United States, 785 F.2d 989 (Fed. Cir. 1986); Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986); Wilson v. United States, 231 Ct. Cl. 958 (1982); Bonen v. United States, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982), and thus the complaint is barred by 28 USC 2401, which imposes a six-year statute of limitations on claims against the United States.

Furthermore, resort to a correction board is a permissive rather than a mandatory step in the review process which neither suspends the statute of

limitations, Hurick, supra; Williams v. Secretary of the Navy, 787 F.2d 552, 562 n. 15 (Fed. Cir. 1986), nor obviously revives a cause of action previously barred by §2401. Appellant's argument that we must review the ABCMR's 1981 and 1982 decisions concerning a matter that accrued 31 years before this suit is contrary to law.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CLEMENT J. PACYNA

v. Docket No. Civ-83-205C

JOHN O. MARSH, JR.,
Secretary of the Army

NAME OF JUDGE: HONORABLE JOHN T. CURTIN

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" ☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict."

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" ☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered."

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IT IS ORDERED AND ADJUDGED

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That defendant's motion for summary judgment is granted, and the complaint is dismissed.

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/S/ JOHN K. ADAMS
JOHN K. ADAMS, Clerk

Buffalo, New York, DATE: March 8, 1984

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM DECISION
CIV-83-205C

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CLEMENT J. PACYNA,

Plaintiff

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

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In this case, plaintiff seeks review of a final decision of the Secretary of the Army. Defendant moves to dismiss on the ground that plaintiff has failed to state a claim and, in the alternative, for summary judgment. The basis for these motions is lack of jurisdiction, statute of limitations, and laches.

The history of this litigation is a long one. It began in 1951, when plaintiff was serving as a master sergeant and applied for an appointment as a warrant officer in the Counter-intelligence Corps (CIC). Although he received approval from his local

commanders, on January 3 (sic), 1952, he was informed that his application did not receive final approval.

Plaintiff continued in military service until 1962, when he retired from the Army with the status of "retired reserve." Nothing occurred after that until February of 1979, when plaintiff made an application through the Freedom of Information Act and examined his personnel file.

On June 13, 1980, plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR), seeking to have his 1952 promotion denial reversed and his records corrected accordingly. Plaintiff claims that his application was timely because it was filed within three years after he discovered the error in his record. In the fall of 1980, the ABCMR solicited and obtained an advisory opinion from the Office of the Judge Advocate General. A copy of the opinion, which re-

commended that plaintiff's claim be denied, was sent to him for his comment. Plaintiff responded in February of 1981.

After considering plaintiff's response, the Board concluded that plaintiff had not given any reason to explain why the action not to appoint him was illegal or in violation of regulations. The Board also held that his failure to timely file his application had made efforts by the Army to investigate his claim difficult. Because of his 28-year delay in challenging the decision made in 1952, only limited documentation is available. This decision was affirmed by the Secretary of the Army on June 7, 1982. Plaintiff's suit followed in February, 1983, with plaintiff claiming that failure to appoint him as a warrant officer was an abuse of discretion and a violation of his rights. He seeks an order of the court appointing him to the rank of warrant officer and retirement pay, including back

payment to the time of the initial denial.

Assuming for the moment that this court has jurisdiction, it is clear that plaintiff's claim is barred by the statute of limitations. 28 U.S.C. §2401(a) provides that a civil suit against the United States must be commenced within six years after the right of action first accrues. The statute may not be waived in actions against the United States. United States v. Kubrick, 444 U.S. 111 (1979). "(A) cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another." Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), quoting Great American Ins. Co. v. Louis Lesser Enterprises, Inc. 353 F.2d 997, 1001 (8th Cir. 1965).

The file in this case was complete in 1952, when plaintiff's application for promotion was rejected. Plaintiff argues that he was not able to obtain the facts

until he looked at his personnel file through a Freedom of Information Act Procedure in 1979, but there was no reason why he could not have reviewed his personnel records at an earlier date. Even if the statute of limitations was tolled during the period plaintiff remained on active duty, pursuant to the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S. C. App. §501 et seq., his cause of action would have accrued upon his retirement in 1962.

Cases such as Kaiser v. Secretary of the Navy, 525 F.Supp 1226 (D. Col. 1981), cited by Plaintiff in support of his application, do not apply here. The statute of limitations did not apply in Kaiser, because the nature of the relief sought in that case was to correct a discharge from dishonorable to honorable. In that type of case, or cases in which the applicant seeks to expunge the judgment of a court martial,

the statute of limitations is not a bar. However, in cases like the present one where the relief sought is money, the statute of limitations is a bar if the case is untimely filed. In this case, the plaintiff wants his records corrected and, at the same time, he wants the government to increase his retirement pay.

Plaintiff cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute. To do this would permit a plaintiff to have the power to avoid the jurisdictional bar every time he submitted an application which was considered by the Board. Thus, whether his claim accrued in 1952 or at the time of his retirement in 1962, the time to institute the suit has long passed.

Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is

jurisdiction under 28 U.S.C. §1346. Plaintiff has waived his claim to any monetary award over $10,000.00.

Defendant's motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

/S/ JOHN T. CURTIN
USDJ

Dated: March 7, 1984.

SUPREME COURT OF THE UNITED STATES

CLEMENT J. PACYNA v. JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1706. Decided January 21, 1986

Per CURIAM.

Certiorari is granted. The judgment is vacated and the case is remanded for the Court of Appeals to transfer the case pursuant to 28 U.S.C. §1631 to the Court of Appeals for the Federal Circuit. See 28 U.S.C. §1295(a)(2).

It is so ordered.

D1

HEADQUARTERS FIRST ARMY
GOVERNORS ISLAND, NEW YORK 4, N.Y.

AHFAG-MP 201 Pacyna,Clement J. 22 JAN 1952

SUBJECT: Temporary Appointment as Warrant Officer

THRU: Commanding Officer
108th CIC Detachment
Boston Army Base
Boston, Massachusetts

TO: M/Sgt Clement J. Pacyna, RA20275571

1. Your application for temporary appointment as warrant officer was received at this headquarters and you were tentatively selected for appointment. Your application was forwarded to The Adjutant General in accordance with current directives.

2. The Adjutant General has informed this headquarters that your appointment as warrant officer, junior grade, Army of the United States in Counter-intelligence career warrant is not favorably considered.

BY COMMAND OF

D2

LIEUTENANT GENERAL CRITTENBERGER:

/S/JEROME L. BAES
JEROME L. BAES
1st Lieut, AGC
Asst Adj Gen

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310
20 Jul 1982

SFMR

Mr. Timothy R. Lovallo, Esq.
950 Ellicott Square Building
Buffalo, New York 14203

Dear Mr. Lovallo:

This is in reply to your letter of 7 July 1982 to the Deputy Assistant Secretary concerning the case of Master Sergeant Clement J. Pacyna, 106-05-7846, United States Army Retired.

Your vigorous dissent has been noted. However, all evidence currently of record clearly indicates that there was no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952.

Please be advised that within the Department of Defense, the authority to effect the change you seek in Sergeant Pacyna's records can be exercised only through the

Board for Correction of Military Records. Accordingly, there is no higher administrative appeal within the Department of Defense.

Should you discover additional substantive evidence not previously submitted, you may ask for reconsideration of Sergeant Pacyna's case. Otherwise this letter constitutes final agency action on his request for correction of military records. However, if you desire additional review of the Board's actions, then you have the right to institute action in a Federal court of competent jurisdiction.

Sincerely,

/s/JOHN W. MATTHEWS
JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records